No. ____ (1)

Supreme Court, U.S.
FILED
041298 MAR 24 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, UNITEDHEALTHCARE, INC., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., ANTHEM, INC., n.k.a. WellPoint, Inc., WELLPOINT HEALTH NETWORKS, INC., n.k.a. WellPoint, Inc., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., HUMANA INC., HUMANA HEALTH PLAN, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, and COVENTRY HEALTH CARE, INC.,

Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD SOTO
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave.
12th Floor
Miami, FL 33131
(305) 577-3177

JAMES W. QUINN
JEFFREY S. KLEIN
NICHOLAS J. PAPPAS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Ave.
New York, NY 10153
(212) 310-8000

WILLIAM E. GRAUER
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, CA 92121
(858) 550-6024

GREGORY S. COLEMAN
Counsel of Record
LISA R. ESKOW
MELANIE P. SARWAL
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, TX 78759
(512) 349-1930

MICHAEL NACHWALTER
ROBERT D. W. LANDON, III
KENNY NACHWALTER, P.A.
201 S. Biscayne Blvd.
Suite 1100
Miami, FL 33131
(305) 373-1000

Counsel for Petitioners

[*Additional counsel listed on inside cover*]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

LAURA BESVINICK
LORI PIECHURA
HOGAN & HARTSON L.L.P.
1111 Brickell Ave.
Suite 1900
Miami, FL 33131
(305) 459-6500

STAN BLUMENFELD
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071
(213) 430-6000

WILLIAM A. HELVESTINE
MICHAEL T. HORAN
LAWRENCE J. ROSE
JAMIE S. PLATTO
EPSTEIN BECKER & GREEN, P.C.
One California St.
San Francisco, CA 94111
(415) 398-3500

K. LEE BLALACK, II
BRIAN P. BROOKS
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006-4001
(202) 383-5300

LINDA J. SMITH
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
7th Floor
Los Angeles, CA 90067
(310) 246-6801

DANIEL A. CASEY
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
Miami Center, 20th Floor
201 South Biscayne Blvd.
Miami, FL 33131
(305) 539-3324

CRAIG A. HOOVER
AUDREY J. ANDERSON
E. DESMOND HOGAN
HOGAN & HARTSON L.L.P.
555 13th St., N.W.
Washington, DC 20004
(202) 637-5600

JEFFREY B. CROCKETT
JORDEN BURT LLP
777 Brickell Ave.
Suite 500
Miami, FL 33131
(305) 347-6990

EDWARD M. CRANE
R. RYAN STOLL
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
333 W. Wacker Dr.
Suite 2100
Chicago, IL 60606
(312) 407-0700

STEPHANIE G. KOLMAN
ADORNO & YOSS, P.A.
2525 Ponce de Leon Blvd.
Suite 400
Miami, FL 33134
(305) 858-5555

JOHN D. ALDOCK
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

V. ROBERT DENHAM, JR.
KATHLYNN L. BUTLER
SUMMER H. MARTIN
POWELL GOLDSTEIN LLP
One Atlantic Center
14th Floor
1201 W. Peachtree St., N.W.
Atlanta, GA 30309

QUESTION PRESENTED

Does §3 of the Federal Arbitration Act, which directs that a district court "shall . . . stay the trial of the action" whenever suit is brought "upon any issue referable to arbitration," 9 U.S.C. §3, give district courts discretion to stay only claims ruled to be arbitrable and proceed to trial without a stay on nonarbitrable claims between the arbitrating parties, even though the trial will judicially resolve issues already determined to be "referable to arbitration"?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiffs-appellees Charles B. Shane, M.D., Jeffrey Book, D.O., Dennis Breen, M.D., Michael Burgess, M.D., Edward L. Davis, D.O., Lance R. Goodman, M.D., H. Robert Harrison, M.D., Glenn L. Kelly, M.D., Leonard J. Klay, M.D., Eugene Mangieri, M.D., Kevin Molk, M.D., Martin Moran, M.D., Manuel Porth, M.D., Thomas Backer, M.D., David Boxstein, M.D., Susan Hansen, M.D., Andres Taleisnik, M.D., Julio Taleisnik, M.D., Roger Wilson, M.D., Navid Ghalambor, M.D., California Medical Association, Texas Medical Association, Medical Association of Georgia, Florida Medical Association, Louisiana State Medical Society, and Denton County Medical Society, and (b) defendants-appellants Humana Health Plan, Inc., Humana Inc., Foundation Health Systems, Inc., n.k.a. Health Net, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n.k.a. PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Inc., f.k.a. United HealthCare Corporation, UnitedHealthcare, Inc., WellPoint Health Networks, Inc., n.k.a. WellPoint, Inc., Coventry Health Care, Inc., and Anthem, inc., n.k.a. WellPoint, Inc.

This petition is being filed on behalf of UnitedHealth Group Inc., f.k.a. United HealthCare Corporation, UnitedHealthcare, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n.k.a. PacifiCare Health Plan Administrators, Inc., Anthem, Inc., n.k.a. WellPoint, Inc., WellPoint Health Networks, Inc., n.k.a. WellPoint, Inc., Humana Health Plan, Inc., Humana Inc., Foundation Health Systems, Inc., n.k.a. Health Net, Inc., The Prudential Insurance Company of America, and Coventry Health Care, Inc.

No publicly held companies own 10% or more of UnitedHealth Group Inc. or PacifiCare Health Systems, Inc. As of

June 2004, the following two companies owned 10% or more of the common stock of Humana Inc.: Wellington Management Company, LLP, and Barclays Global Investors, NA (and related companies). As of December 2004, Barclays Global Investors owned 10% or more of the common stock of Coventry Health Care, Inc.

UnitedHealthcare, Inc., is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Inc., a publicly held company. PacifiCare Operations, Inc., n.k.a. PacifiCare Health Plan Administrators, Inc., is owned 100% by PacifiCare Health Systems, Inc., a publicly held company. Humana Inc. is the parent company and owns 100% of Humana Health Plan, Inc., and is a publicly traded corporation on the New York Stock Exchange. Prudential Financial, Inc., is the parent company of Prudential Holdings, LLC, which in turn is the parent company of The Prudential Insurance Company of America.

As of November 30, 2004, Anthem, Inc., merged with WellPoint Health Networks, Inc., to form WellPoint, Inc. WellPoint, Inc., has no parent corporation, nor did WellPoint Health Networks, Inc. No publicly held company owns 10% or more of the stock of WellPoint, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to Proceedings Below and Corporate Disclosure Statement	ii
Table of Authorities	vii
Citation of Opinions and Orders	2
Jurisdiction	3
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Petition	8
I. The Court Should Resolve the Conflict Among the Courts of Appeals Regarding the Comprehensive Reach of the Mandatory Stay Under §3	8
A. Congress Enacted the Federal Arbitration Act to Protect and Facilitate Arbitration Agreements	9
B. The Courts of Appeals Disagree Over Whether §3 Reaches Nonarbitrable Claims Between Parties to an Arbitration Agreement	11
C. To Protect Parties' Arbitration Rights Under the FAA, the Court Should Resolve the Divide Between the Courts on the Scope of the §3 Stay	18
Conclusion	21

TABLE OF CONTENTS—CONTINUED

Page

Appendix

Order Granting in Part and Denying in Part Motions to Compel Arbitration (without attachments) (Sept. 15, 2003) 1a

Eleventh Circuit Opinion (Nov. 5, 2004) 29a

Order Denying Petition for Rehearing En Banc (Jan. 7, 2005) 49a

18 U.S.C. §2 ..... 51a

18 U.S.C. §1961 ..... 52a

18 U.S.C. §1962 ..... 57a

TABLE OF AUTHORITIES

CASES — Page

Am. Recovery Corp. v. *Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (CA4 1996) 8, 13
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) ..... *passim*
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 11
Genesco, Inc. v. *T. Kakiuchi & Co.*, 815 F.2d 840 (CA2 1987) 8, 14
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 9
Hill v. *G.E. Power Sys., Inc.*, 282 F.3d 343 (CA5 2002) 17
IDS Life Ins. Co. v. *SunAmerica, Inc.*, 103 F.3d 524 (CA7 1996) 15, 16
In re Managed Care Litig., 132 F.Supp.2d 989 (S.D. Fla. 2000) 5
In re Managed Care Litig., 143 F.Supp.2d 1371 (S.D. Fla. 2001) 5
In re Managed Care Litig., No. MDL 1334, 2003 WL 22410373 (S.D. Fla. Sept. 15, 2003) 2, 4-5
Klay v. *All Defendants*, 389 F.3d 1191 (CA11 2004) 2
Klay v. *United HealthGroup, Inc.*, 376 F.3d 1092 (CA11 2004) 6, 7
Kroll v. *Doctor's Assocs., Inc.*, 3 F.3d 1167 (CA7 1993) 16
Lloyd v. *HOVENSA, LLC*, 369 F.3d 263 (CA3 2004) 8, 14
McCarthy v. *Azure*, 22 F.3d 351 (CA1 1994) 8, 13
McCowan v. *Sears, Roebuck & Co.*, 908 F.2d 1099 (CA2 1990) 14

TABLE OF AUTHORITIES—CONTINUED

Page

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 9, 15
Morrie Mages & Shirlee Mages Found. v. *Thrifty Corp.*, 916 F.2d 402 (CA7 1990) 8, 15, 16, 19
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) ..... *passim*
PacifiCare Health Sys., Inc. v. *Book*, 538 U.S. 401 (2003) 2, 6
Pryner v. *Tractor Supply Co.*, 109 F.3d 354 (CA7 1997) 15
S.A. Mineracao da Trindade-Samitri v. *Utah Int'l, Inc.*, 745 F.2d 190 (CA2 1984) 8, 13
Sam Reisfeld & Son Imp. Co. v. *S.A. Eteco*, 530 F.2d 679 (CA5 1976) 16, 17
Shearson/Am. Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 11, 15
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 9
Subway Equip. Leasing Corp. v. *Forte*, 169 F.3d 324 (CA5 1999) 17
The Anaconda v. *Am. Sugar Ref. Co.*, 322 U.S. 42 (1944) 18
Waste Mgmt., Inc. v. *Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339 (CA5 2004) 8, 17, 19

STATUTES

9 U.S.C. §3 ..... *passim*
9 U.S.C. §4 ..... 9, 10, 11, 13
18 U.S.C. §2 3
18 U.S.C. §1961 ..... 3, 5

TABLE OF AUTHORITIES—CONTINUED

	Page
18 U.S.C. §1962	3
28 U.S.C. §1254	3
29 U.S.C. §1132(a)(1)	5
29 U.S.C. §1132(a)(3)	5

IN THE

Supreme Court of the United States

No. ___

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, UNITEDHEALTHCARE, INC., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., ANTHEM, INC., n.k.a. WellPoint, Inc., WELLPOINT HEALTH NETWORKS, INC., n.k.a. WellPoint, Inc., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., HUMANA INC., HUMANA HEALTH PLAN, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, and COVENTRY HEALTH CARE, INC.,
Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Court should grant this petition to resolve a deepening conflict among the courts of appeals regarding the proper interpretation of §3 of the Federal Arbitration Act, which provides the linchpin of Congress's framework for protecting arbitration rights against improper attempts to litigate issues that parties have agreed to arbitrate. Contrary to the express language of §3, which declares a mandatory stay pending arbitration so that arbitral rights will not be undercut by pre-

emptive litigation, the Eleventh Circuit has joined a growing faction of circuits that have misinterpreted §3 and this Court's precedents as allowing a district court discretion to deny the litigation stay if the plaintiff has pleaded even a single claim that the court determines to be nonarbitrable, notwithstanding the presence of other claims that involve the same arbitrable issues.

Frustrating the mandate of this Court's express holding just two years ago in this very case, *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401, 406-07 & n.2 (2003), in which the Court determined that petitioners were entitled to arbitrate the RICO claims asserted against them, the Eleventh Circuit has misconstrued the FAA to permit a district court to deny the §3 stay—essential to enforcement of arbitral rights—based solely on respondents' ability to plead a claim that the district court believes is not arbitrable. In other words, although this Court directly ordered that the RICO claims are arbitrable under the FAA, the Eleventh Circuit held that a district court may permit the arbitrable issues between the parties to be litigated in the name of another cause of action by denying the FAA-mandated stay. The result is the successful evisceration by the named respondents of not only the dozens of arbitration agreements that they entered into with the managed care companies with whom they do business, but also literally millions of similar arbitration agreements of unnamed class members. Without a faithful application of the stay mandated by Congress to protect arbitral rights, the strong federal policy favoring arbitration will be converted into a mere game of artful pleading.

CITATION OF OPINIONS AND ORDERS

The court of appeals's decision, App. 29a, is reported at *Klay* v. *All Defendants*, 389 F.3d 1191 (CA11 2004). The opinion of the district court, App. 1a, is unpublished but available at *In re Managed Care Litigation*, No. MDL 1334, 2003 WL 22410373 (S.D. Fla. Sept. 15, 2003).

JURISDICTION

The Eleventh Circuit issued its judgment and opinion on November 5, 2004, and denied rehearing en banc on January 7, 2005. App. 49a-50a. The Court has jurisdiction under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The stay provision of the Federal Arbitration Act provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. §3.

The appendix includes the relevant provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961, 1962, and the federal aiding-and-abetting statute, 18 U.S.C. §2. *See* App. 51a-58a.

STATEMENT OF THE CASE

This is a consolidated MDL lawsuit that has been certified as a nationwide class action by the district court. The action is brought by 13 individually named physicians and 5 state and regional medical associations on behalf of virtually every physician in the country (over 600,000 physicians) against eight of the country's largest managed care companies (MCCs).

Every year, petitioners process billions of claims submitted for payment by physicians across the country. Although

patients bear the primary responsibility to pay for medical services they receive, a physician may obtain a contractual right to reimbursement directly from an MCC, typically from a provider agreement between an MCC and either the physician or a provider group with whom the physician is affiliated. The MCCs' operating subsidiaries that process these billions of claims necessarily employ a variety of computer systems and software programs in the claims-review and adjudication process. D.653.¶¶5-6.[1] These computer systems, which enable the prompt and accurate high-speed processing of claims, are programmed to apply rules that try to detect, among other things, billing mistakes, improper claims, and fraud. D.612.16-25.

It is inevitable that disputes will arise between physicians and the MCCs concerning payment of some claims, and that inevitability creates a need for an effective and efficient dispute-resolution process. The provider agreements between the MCCs and physicians almost universally require arbitration, not litigation, of any disputes between the MCCs and physicians. Hundreds of thousands of physicians have bound themselves to arbitrate their disputes with the MCCs with whom they do business. More directly, every respondent physician in this litigation is bound by one or more arbitration agreements with one or more of the petitioner MCCs, and each MCC has one or more arbitration agreements with one or more respondents. Although the precise language of the arbitration provisions may vary, all are drafted in broad terms that encompass virtually every dispute that could arise between the parties.[2]

---

[1] The citation "D.___" represents the district-court docket number.

[2] The arbitration provisions include agreements to arbitrate, for example, "all grievances and disputes," all claims "related to" the contract, and "any controversy, dispute, or claim arising out of the agreement." App. 13a, 41a n.11. A 104-page table listing the arbitration agreements is available on Westlaw as an appendix to the district court's opinion. *In re*

Respondents in this case have accused the MCCs of improperly paying claims submitted by physicians for the provision of medical services as part of an alleged industry-wide scheme. Respondents' complaint asserts numerous state, federal, and common-law causes of action against the MCCs, including breach of contract, quasi-contract (*i.e.*, quantum meruit and unjust enrichment), state prompt-pay and other statutory violations, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.*, and the Employee Retirement Income and Security Act, *see* 29 U.S.C. §1132(a)(1) and (3). D.167; D.1015; D.1607. Every cause of action, however denominated, alleges at bottom that the MCCs failed to reimburse respondents in accordance with their contractual and statutory obligations and that the MCCs conspired with and aided and abetted one another to deprive respondents of proper reimbursement. App. 30a.

Rather than submit to arbitration, as they were contractually obligated to do, respondents announced to the lower courts that they would never arbitrate any part of the dispute and undertook an elaborate scheme to avoid arbitration or imposition of the congressionally mandated stay pending arbitration. Respondents vigorously contested the arbitrability of the dispute but ultimately lost that battle both as to their general assertion that the lawsuit does not involve arbitrable issues, App. 9a, 19a; *In re Managed Care Litig.*, 143 F.Supp.2d 1371, 1374-75 (S.D. Fla. 2001); *In re Managed Care Litig.*, 132 F.Supp.2d 989, 994, 1001-02 & n.6, 1003-07 (S.D. Fla. 2000), and as to their specific allegation that the RICO statute preserved a right to litigate their treble-damages claims notwithstanding the presence of remedial limita-

---

Managed Care Litig., No. MDL 1334, 2003 WL 22410373 (S.D. Fla. Sept. 15, 2003).

tions in the arbitration agreements, *see PacifiCare Health Sys., Inc.* v. *Book*, 538 U.S. 401, 406-07 & n.2 (2003).

On remand from the Court's decision in *PacifiCare*, respondents successfully convinced the district court that arbitration and the §3 stay could still be avoided if they informally "dismissed" without prejudice any claims found to be arbitrable.[3] App. 22a-24a. Rather than focus on the existence of arbitrable issues, as the FAA requires, the district court conducted its arbitrability analysis on a claim-by-claim basis and, although *nearly all* of respondents' claims were subject to arbitration, the court refused to compel arbitration or stay the litigation of indirect RICO conspiracy and aiding-and-abetting claims that it characterized as based on "contractual relationships with other managed care companies." App. 11a.

The distinction drawn by the district court is best demonstrated by example. Assume physician A sues two MCCs, Y and Z, alleging improper reimbursement decisions. Physician A has provider agreements with both Y and Z that contain arbitration agreements. Under the district court's analysis, A has to arbitrate any claim against Y for Y's own reimbursement decisions and must similarly arbitrate any claim against Z for Z's alleged improper reimbursement decisions. But the district court's claim-based analysis improperly permits A to avoid arbitration altogether merely by asserting indirect claims against Y for conspiring with and aiding and abetting Z in Z's alleged improper reimbursement decisions

---

[3] Arguing that the informal dismissals mooted any consideration of arbitration, respondents in the interim secured an injunction from the district court against petitioners that barred any attempt to initiate arbitration. D.1705. That injunction was only recently reversed by a different panel of the Eleventh Circuit based, in part, on the court's holding that respondents' attempts to informally dismiss claims held to be arbitrable were ineffective. *Klay* v. *United HealthGroup, Inc.*, 376 F.3d 1092, 1104-07 (CA11 2004).

and claims against Z for conspiring with and aiding and abetting Y in Y's alleged improper reimbursement decisions. Under the district court's analysis, even though A has provider agreements with both Y and Z, A does not have to arbitrate with either because the criss-crossing conspiracy claims are conveniently based on the relationship with the other MCC.

Regardless of the artifice respondents used to confuse the arbitrability analysis, it was undisputed that the claims the district court held to be nonarbitrable involved the same issues the court had held to be arbitrable when asserted between the parties to the provider agreement. In terms of the hypothetical just given, the conspiracy claim against Z still purports to try whether Y made improper reimbursement decisions, a core issue that Y, also a defendant, will be forced to litigate without the stay mandated by §3 of the FAA. Notwithstanding the continuing presence of arbitrable issues in the lawsuit, the district court nevertheless denied the requested §3 stay pending arbitration. App. 24a. Relying in part on its earlier erroneous determination that respondents' feigned dismissal of claims without prejudice made those claims nonjusticiable and therefore nonarbitrable, the district court held that it need not issue a stay under §3 of the FAA as long as respondents continued to state that they were dismissing without prejudice any specific claims that the court deemed arbitrable. *Id.* By the time the Eleventh Circuit decided petitioners' appeal, a different panel of the court had reversed the arbitration injunction and held that respondents' attempted informal dismissals were invalid, *Klay*, 376 F.3d, at 1104-06, but the court affirmed both the district court's scope analysis and its denial of the §3 stay on the grounds that the stay was discretionary and that the district court had not abused its discretion in refusing the stay. App. 46a-47a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE COMPREHENSIVE REACH OF THE MANDATORY STAY UNDER §3.

The Eleventh Circuit's decision deepens a division among the courts of appeals regarding the proper implementation of the FAA's mandatory stay pending arbitration. Although the Third, Fifth, and Seventh Circuits have correctly interpreted the statute to require a stay of all litigation when a suit involves issues referable to arbitration,[4] other courts of appeals—like the Eleventh Circuit—have misread §3's mandate as applying only to specific claims on which the court compels arbitration, treating requests to stay the remainder of the litigation as purely discretionary.[5] This discretionary approach conflicts with the plain language of §3, misconstrues the Court's decisions interpreting the FAA, and subverts Congress's express directive that courts liberally construe arbitration agreements in favor of arbitration and protect arbitration rights by prohibiting attempts to preemptively litigate issues referable to arbitration.

The Court should grant the petition to resolve growing confusion over the proper application of §3, which infuses uncertainty into the arbitration process and encourages costly and time-consuming litigation over courts' authority to parse arbitrable from nonarbitrable claims and to permit preemptive

---

[4] *See, e.g.*, *Waste Mgmt., Inc.* v. *Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 342 (CA5 2004); *Lloyd* v. *HOVENSA, LLC*, 369 F.3d 263, 269 (CA3 2004); *Morrie Mages & Shirlee Mages Found.* v. *Thrifty Corp.*, 916 F.2d 402, 405-06 (CA7 1990).

[5] App. 46a-47a; *Am. Recovery Corp.* v. *Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 97 (CA4 1996); *McCarthy* v. *Azure*, 22 F.3d 351, 361 & n.15 (CA1 1994); *S.A. Mineracao da Trindade-Samitri* v. *Utah Int'l, Inc.*, 745 F.2d 190, 196 (CA2 1984); *Genesco, Inc.* v. *T. Kakiuchi & Co.*, 815 F.2d 840, 856 (CA2 1987).

trials that may, as in this case, judicially determine every arbitrable issue between the parties. The conflict over §3's stay mandate warrants the Court's attention because it rests on the courts of appeals' conflicting interpretations of *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985). The Court should clarify whether, as the Eleventh Circuit and others suggest, these two decisions authorize a district court to disregard the express text of §3 and proceed to trial notwithstanding its determination that a case involves issues referable to arbitration.

A. Congress Enacted the Federal Arbitration Act to Protect and Facilitate Arbitration Agreements.

Through the FAA, Congress "reverse[d] the long-standing judicial hostility to arbitration agreements" and "place[d] arbitration agreements upon the same footing as other contracts." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Southland Corp.* v. *Keating*, 465 U.S. 1, 12-13 (1984). Congress's clear objective was to ensure the enforcement of agreements to arbitrate. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985).

Congress addressed the judicial failure to honor arbitration agreements not only by legislating enforcement through the FAA, but also by "declar[ing] a national policy favoring arbitration." *Southland*, 465 U.S., at 2. In addition to requiring recalcitrant parties to arbitrate once disputed issues are shown to be within the scope of a valid arbitration agreement, 9 U.S.C. §4, the FAA provides for a mandatory stay to protect the enforcement and effectiveness of the parties' agreement to arbitrate.

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is

> pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. §3.

Under the plain text of §3, the stay is mandatory once arbitrable issues are identified and a party requests a stay. Section 3 requires a stay of trial proceedings until the conclusion of the arbitration to prevent parties' arbitration rights from being undermined by preemptive litigation of overlapping nonarbitrable claims. Requiring the parties to first resolve all arbitrable issues in arbitration permits the parties to devote their resources to arbitration, eliminates interference or interjection of issues from the litigation, and prevents inconsistent results. By protecting the parties' arbitration rights in this way—in a manner not accomplished by any other provision of the FAA—the §3 stay is critical to the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S., at 23.

The scope analysis mandated by the FAA and the Court's interpretation of §3 and §4 is a threshold inquiry to determine whether parties to an arbitration agreement have agreed to arbitrate issues in the dispute; it is not a procedure for weeding out arbitrable claims so that the remaining claims can go to trial, as the Eleventh Circuit implicitly held. Nothing in the language of §3 either limits the stay to cases in which all issues are arbitrable or permits a malleable interpretation of the section that is mandatory as to claims found to be arbitrable but only discretionary as to claims found to be nonarbitrable. Consistent with Congress's broad objective of enforcing arbitration agreements, and the more specific goal of the stay mechanism to prevent litigation from proceeding before the conclusion of arbitration, §3 is applicable to every action involving arbitrable issues. Contrary to Congress's intent expressed in the plain language of the statute and the FAA's legislative history, the Eleventh

Circuit's decision repudiates the stay's mandatory nature for suits that indisputably involve arbitrable issues, based solely on a district court's determination that the plaintiffs have alleged at least one claim that is not itself arbitrable. That result eviscerates the fundamental protection provided by the stay and revives the "judicial hostility" to arbitration that the FAA was intended to arrest.

B. The Courts of Appeals Disagree Over Whether §3 Reaches Nonarbitrable Claims Between Parties to an Arbitration Agreement.

The Court has not previously addressed the §3 stay separately from arbitrability issues, although it has observed §3's mandatory and comprehensive nature—and in language that would appear to resolve the question in petitioners' favor. *See Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) ("[A] court must stay its proceedings if it is satisfied that an issue before it is arbitrable."); *see also EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (noting that "[t]he FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration"). The Third, Fifth, and Seventh Circuits have understood that when issues are determined to be arbitrable under the FAA, the remaining litigation between the parties to an arbitration agreement cannot proceed. *See supra* note 4. Other courts, however—like the Eleventh Circuit—have increasingly permitted litigation between parties to an arbitration agreement while simultaneously compelling arbitration under §4 of the FAA. These courts treat the §3 stay as mandatory only as to litigation of claims being resolved by arbitration, viewing requests to stay litigation of nonarbitrable claims as discretionary matters for the district court. *See* App. 46a ("When confronted with litigants advancing both arbitrable and nonarbitrable claims, however, courts have discretion to stay nonarbitrable claims."); *see also supra* note 5.

The Eleventh Circuit's misunderstanding of §3 stems from a misreading of *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985), neither of which construed §3's mandatory stay provision. Instead, *Moses H. Cone* suggested that a federal district court could, within its discretion, stay separate state-court litigation involving claims against both a signatory and a nonsignatory to the arbitration agreement. 460 U.S., at 27 n.23.[6] The discretionary stay at issue in *Moses H. Cone* was not a §3 stay, and nothing in the Court's opinion suggests that discretion exists when the trial court has determined that arbitrable issues are present in the case and a party entitled to arbitrate requests a stay of litigation pursuant to §3. *Id.*, at 26-27 & nn.34 & 36.[7] Rather, *Moses H. Cone* broadened §3's stay directive by identifying an additional, nonstatutory source of authority to stay litigation in other courts to protect arbitration rights. *Moses H. Cone* expanded, rather than contracted, a party's options for obtaining a stay of litigation to enforce arbitral rights.

Byrd similarly lends no support to a discretionary reading of §3. In *Byrd*, the Court adhered to the language and purposes of the FAA in rejecting the "doctrine of intertwining" that lower courts had used to block arbitration when cases involved interconnected arbitrable and nonarbitrable claims, reasoning that that any inefficiencies from dual proceedings did not override Congress's paramount objective to enforce private agreements to arbitrate. 470 U.S., at 216-17. As in *Moses H. Cone*, the Court did not consider any request for a

---

[6] The Court's reference to nonsignatory litigants was clearly a reference to the state-court litigation to which the district court had deferred because the federal suit before the Court involved only the parties to the arbitration agreement. *Moses H. Cone*, 460 U.S., at 7.

[7] The fact that the Court discussed §3 later in its opinion also clearly demonstrates that the stay referenced in footnote 23 was not a §3 stay.

§3 stay. The issue before the Court was whether the FAA's §4 directive to enforce arbitration agreements could be sacrificed to avoid proceedings in dual fora, not whether a court can permit proceedings in two fora despite a party's request for a §3 stay of the litigation.

Several courts have used *Moses H. Cone* and *Byrd* to justify reading §3 as mandatory as to arbitrable claims only, viewing requests to stay remaining claims as lying within the district court's discretion. In particular, courts have misread the Court's statement in *Moses H. Cone* that federal courts have discretion to stay other litigation between non-arbitrating parties as justification for interpreting §3 to provide only a discretionary stay of nonarbitrable claims. In doing so, courts have taken out of context the recognition in *Moses H. Cone* and *Byrd* that "piecemeal resolution" of disputes may be "necessary to give effect to an arbitration agreement," *Byrd*, 470 U.S., at 221; *Moses Cone*, 460 U.S., at 20, and have drawn upon that language to thwart rather than protect arbitration as the Court intended.

Through this distorted reading of *Moses H. Cone* and *Byrd*, the Eleventh Circuit has joined the First, Second, and Fourth Circuits in authorizing district courts to deny a §3 stay of litigation of nonarbitrable claims and permit parallel litigation and arbitration proceedings over an arbitrating party's objection. *See, e.g.*, App. 47a (relying on *Moses H. Cone*, 460 U.S., at 20, and *Byrd*, 470 U.S., at 221, in affirming discretionary refusal to stay nonarbitrable claims); *Am. Recovery Corp.* v. *Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 97 (CA4 1996) (relying on *Moses H. Cone* and *Byrd* to hold that a stay of nonarbitrable claims is discretionary); *McCarthy* v. *Azure*, 22 F.3d 351, 361 & n.15 (CA1 1994) (relying on *Moses H. Cone* to characterize stay of nonarbitrable claims as discretionary); *S.A. Mineracao da Trindade-Samitri* v. *Utah Int'l, Inc.*, 745 F.2d 190, 196 (CA2 1984) (relying on *Moses H. Cone*, 460 U.S., at 27 n.23, to treat stay of claims as

discretionary); *Genesco, Inc.* v. *T. Kakiuchi & Co.*, 815 F.2d 840, 856 (CA2 1987) (same).[8]

By contrast, the Third, Fifth, and Seventh Circuits have interpreted §3's stay directive as mandatory for an "action"—not merely arbitrable "claims" or "issues"—particularly when the litigation could judicially determine issues that have been found to be arbitrable. Emphasizing the unqualified nature of Congress's "unambiguous directive" in §3, the Third Circuit has explained that "the statute clearly states, without exception, that whenever suit is brought on an arbitrable claim, the Court 'shall' upon application stay the litigation until arbitration has been concluded." *Lloyd* v. *HOVENSA, LLC*, 369 F.3d 263, 269 (CA3 2004). Because "Congress meant exactly what it said," *id.*, at 270, a district court is "obligated under 9 U.S.C. §3 to grant the stay once it decide[s] to order arbitration" on an arbitrable claim. *Id.*, at 269 (holding that district court lacked discretion under §3 to dismiss, rather than stay, claims after finding issues referable to arbitration). Faithful adherence to the mandatory stay language in §3 furthers the policy goals of the FAA, because "[h]olding that Congress intended to deprive the District Court of discretion to deny a stay produces results that effectively promote and facilitate arbitration." *Id.*, at 270.

The Seventh Circuit also has interpreted §3's plain language to mandate a stay of the entire litigation but acknowledged other circuits' view, rooted in *Byrd*, that the stay is discretionary for nonarbitrable claims: "The arbitration act says in fact that the court shall stay the suit, not just a piece of the suit, if the suit is 'brought upon' an arbitrable issue, 9 U.S.C. §3, though the cases, perhaps concerned lest the tail

---

[8] In one instance, the Second Circuit, inconsistent with that court's other opinions, required a stay of a nonarbitrable claim between two arbitrating parties. *See McCowan* v. *Sears, Roebuck & Co.*, 908 F.2d 1099, 1106-07 (CA2 1990).

wag the dog, treat the question whether to stay the entire case as discretionary in cases involving both arbitrable and nonarbitrable issues." *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 361 (CA7 1997) (citing the First, Second, and Fourth Circuits' holdings). Suggesting that *Byrd* assumed a discretionary approach, the Seventh Circuit attempted to explain this inconsistency with §3's plain text by noting that *Byrd* involved claims nonarbitrable as a matter of law, as opposed to claims parties did not agree to arbitrate. *Id.* That rationale, however, lacks persuasive force, especially given the Court's rejection of previously prevailing notions that statutory claims are nonarbitrable as a matter of law. *See, e.g.*, *McMahon*, 482 U.S., at 226-27, 238, 242 (emphasizing the propriety of agreements to arbitrate statutory claims absent a contrary congressional directive and holding that Securities Exchange Act and RICO claims were arbitrable); *Mitsubishi Motors Corp.*, 473 U.S., at 628-38 (rejecting nonarbitrability, as a matter of law, of antitrust claims arising from international transactions). By recognizing the tension between §3's mandatory text, other circuits' discretionary-stay approaches, and unresolved assumptions about *Byrd*, *Pryner* underscores the need for the Court to resolve disagreement over the §3 stay and to clarify whether and, if so, how, *Byrd* relates to that provision.

In other cases, the Seventh Circuit has adopted a plain, textual reading of §3 without referencing or attempting to explain other courts' discretionary approaches, emphasizing that under §3 "district courts have no discretion to refuse a request for a stay." *Morrie Mages & Shirlee Mages Found.* v. *Thrifty Corp.*, 916 F.2d 402, 405-06 (CA7 1990). Moreover, the Seventh Circuit has viewed the stay mandated by §3 as comprehensive: "The only purpose that we can ascribe to the word 'issue' in [§3] is to enable litigation to be stayed pending arbitration even if only one of the issues in the litigation is subject to an agreement to arbitrate." *IDS Life Ins. Co.* v. *SunAmerica, Inc.*, 103 F.3d 524, 529 (CA7 1996);

see also Kroll v. *Doctor's Assocs., Inc.*, 3 F.3d 1167, 1171 (CA7 1993) (explaining that §3 "plainly requires that a district court stay litigation where *issues* presented in the litigation are the subject of an arbitration agreement") (quotations omitted); *Morrie Mages*, 916 F.2d, at 406 ("[I]f the federal action concerns an 'issue referable to arbitration' under the terms of the arbitration agreement, the district court must stay the trial until the arbitration has concluded."). Although the Seventh Circuit has questioned the availability of §3 to persons who are not parties to an arbitration agreement,[9] the Seventh Circuit has never held that a party to a valid and applicable arbitration agreement can be denied the mandatory stay Congress established in the text of §3. Unlike the Eleventh Circuit, which has permitted the district court discretion to deny a stay in a case in which all of the MCCs have arbitration agreements that encompass arbitrable issues, the Seventh Circuit would clearly require a mandatory §3 stay of the litigation.

The Eleventh Circuit's refusal to enforce §3's mandatory stay notwithstanding the indisputable presence of arbitrable issues also creates a square conflict with the Fifth Circuit, which has required §3 stays of litigation to prevent judicial disruption of the arbitral process when the same or similar operative facts form the bases for arbitrable and nonarbitrable claims. The Fifth Circuit has even extended §3's stay mechanism to nonsignatories as a matter of discretion, making clear that a district court lacks discretion to refuse a nonsignatory's §3 stay request when litigation may judicially determine issues that are referable to arbitration. *Sam Reisfeld & Son Imp. Co.* v. *S.A. Eteco*, 530 F.2d 679, 681 (CA5 1976) (explaining that district court properly included

[9] *Compare Morrie Mages*, 916 F.2d, at 407-08 (extending "the mandatory stay under section 3" to claims against nonsignatories), *with IDS Life Ins.*, 103 F.3d, at 530 (rooting a stay of claims against nonsignatories in the abstention doctrine, not §3).

nonarbitrable claims against nonsignatories within its §3 stay because, "forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted"); *see also, e.g.*, *Subway Equip. Leasing Corp.* v. *Forte*, 169 F.3d 324, 329 (CA5 1999) (agreeing that §3 required the district court to stay litigation that included issues subject to an arbitration agreement).

The Eleventh Circuit misinterpreted the Fifth Circuit's extension of §3 to nonsignatories as support for the very different, and textually unsupportable, position that §3 also permits a district court to deny *an arbitrating party's* request to stay nonarbitrable claims. App. 46a (suggesting, erroneously, that *Reisfeld*, 530 F.2d, at 621, supports courts' discretion to stay nonarbitrable claims against an arbitrating party). Moreover, although the Fifth Circuit has previously described §3's applicability to nonsignatories as discretionary, *Reisfeld*, 530 F.2d, at 681, it has enforced the provision as mandatory even as to nonsignatories when issues in the litigation overlap with issues referable to arbitration. *See, e.g.*, *Waste Mgmt., Inc.* v. *Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 342 (CA5 2004) (observing the court's recognition of a nonsignatory's right to request a "*mandatory* stay of litigation" based on overlapping litigation and arbitrable claims and holding that district court's denial of a mandatory stay conflicted with both Fifth Circuit precedent and the FAA); *Hill* v. *G.E. Power Sys., Inc.*, 282 F.3d 343, 348 (CA5 2002) (reversing district court's denial of nonsignatory's §3 stay request when claims against nonsignatory overlapped with issues between arbitrating parties and litigation would undermine the arbitration proceedings). Far from lending support to the Eleventh Circuit's discretionary interpretation of §3, the Fifth Circuit's mandatory approach squarely contradicts the Eleventh Circuit's interpretation of the statute.

The courts of appeals' disagreement over the §3 stay has been deepened by the Eleventh Circuit's alignment with the First, Second, and Fourth Circuits' discretionary interpretation of the statute. Because the growing confusion is based on a misreading of *Moses H. Cone* and *Byrd* that only this Court can appropriately correct, the Court should grant the petition to ensure that parties' arbitration rights are not thwarted by inconsistent and incorrect applications of the FAA's §3 stay mechanism.

C. To Protect Parties' Arbitration Rights Under the FAA, the Court Should Resolve the Divide Between the Courts on the Scope of the §3 Stay.

Part of the genius of the FAA is that the §3 stay not only protects the parties' arbitration rights, but also provides an impetus for arbitration by preventing litigation until after the completion of arbitration. *See The Anaconda* v. *Am. Sugar Ref. Co.*, 322 U.S. 42, 45 (1944) (explaining that "if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration"). This well-designed plan is undermined by the Eleventh Circuit's holding and the other courts of appeals' treatment of the §3 stay as discretionary and only limited in scope. The failure to implement §3 as a mandatory, comprehensive stay guarantees that litigation will not await arbitration and, in fact, will force parties to litigate arbitrable issues in violation of their contractual and statutory rights, creating a race to judgment—precisely what the §3 stay was intended to prevent.[10]

Because of the criss-crossing nature of respondents' conspiracy and aiding-and-abetting claims, it is indisputable that every issue the district court ever found to be arbitrable remains in this proceeding and will have to be litigated by the MCCs in utter derogation of their rights to arbitrate.

---

[10] In this case, no race was possible because the district court improperly enjoined petitioners from even attempting to arbitrate the dispute.

Although United is entitled to arbitrate disputes over its reimbursement decisions, the Eleventh Circuit's holding will require United to participate in a trial that litigates the propriety of those reimbursement decisions under the guise of conspiracy and aiding-and-abetting claims. The same is true for all petitioners. Respondents' manipulation of the judicial system makes a mockery of the arbitration rights Congress intended the §3 stay to protect.

With the Eleventh Circuit's alignment with the First, Second, and Fourth Circuits, it is increasingly true that a stay will not issue to halt litigation pending arbitration. Parties will be denied not only the cost savings for which they bargained in those circuits, but also the underlying contractual right to arbitrate. *See, e.g.*, *Waste Mgmt.*, 372 F.3d, at 345 (explaining that denial of a stay would raise a "valid concern" about "the integrity of the arbitration and the preservation of [the arbitrating parties'] rights to that contractual agreement" and would "risk inconsistent results, and 'substantially impact' the arbitration); *Morrie Mages*, 916 F.2d, at 407 (recognizing "a potential for impairment of the issues before the arbitrator" when litigation proceeds on arbitrable issues). The simplicity of staying the case if it involves arbitrable issues is being replaced by an increasingly complex game of artful pleading. In the First, Second, Fourth, and Eleventh Circuits, a party desiring to litigate rather than arbitrate need only multiply claims into a complicated web to evade arbitration obligations, recasting litigation claims as nonarbitrable or suing other persons or entities with whom no arbitration agreement exists.

Under rulings like the Eleventh Circuit's, the fact that the core allegations invoke arbitrable issues is of little significance. All that matters is that the district court identify some claim that it believes to be nonarbitrable—like the indirect RICO conspiracy or aiding-and-abetting claims in this case—and the court can then deny the stay and permit the

litigation to proceed. Inconsistent enforcement of the §3 stay creates perverse incentives to interject a maze of pleaded claims calculated to maximize the chances of avoiding arbitration. As a result, the arbitration rights of litigants in circuits that permit partial and discretionary stays do not enjoy the same protections offered in the circuits that treat the §3 stay as mandatory and comprehensive.

Because the court of appeals's decision represents a conflict that implicates the highly significant issues of maintaining parties' arbitration rights and safeguarding the effectiveness of the arbitration process, it warrants the Court's review. The Court should resolve the disagreement over implementation of the §3 stay to ensure that courts properly and consistently serve the FAA's goals and mandates.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

EDWARD SOTO
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave.
12th Floor
Miami, FL 33131
(305) 577-3177

JAMES W. QUINN
JEFFREY S. KLEIN
NICHOLAS J. PAPPAS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Ave.
New York, NY 10153
(212) 310-8000

WILLIAM E. GRAUER
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, CA 92121
(858) 550-6024

LAURA BESVINICK
LORI PIECHURA
HOGAN & HARTSON L.L.P.
1111 Brickell Ave.
Suite 1900
Miami, FL 33131
(305) 459-6500

STAN BLUMENFELD
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071
(213) 430-6000

GREGORY S. COLEMAN
Counsel of Record
LISA R. ESKOW
MELANIE P. SARWAL
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, TX 78759
(512) 349-1930

MICHAEL NACHWALTER
ROBERT D. W. LANDON, III
KENNY NACHWALTER, P.A.
201 S. Biscayne Blvd.
Suite 1100
Miami, FL 33131
(305) 373-1000

CRAIG A. HOOVER
AUDREY J. ANDERSON
E. DESMOND HOGAN
HOGAN & HARTSON L.L.P.
555 13th St., N.W.
Washington, DC 20004
(202) 637-5600

JEFFREY B. CROCKETT
JORDEN BURT LLP
777 Brickell Ave.
Suite 500
Miami, FL 33131
(305) 347-6990

WILLIAM A. HELVESTINE
MICHAEL T. HORAN
LAWRENCE J. ROSE
JAMIE S. PLATTO
EPSTEIN BECKER & GREEN, P.C.
One California St.
San Francisco, CA 94111
(415) 398-3500

K. LEE BLALACK, II
BRIAN P. BROOKS
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006-4001
(202) 383-5300

LINDA J. SMITH
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
7th Floor
Los Angeles, CA 90067
(310) 246-6801

DANIEL A. CASEY
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
Miami Center, 20th Floor
201 South Biscayne Blvd.
Miami, FL 33131
(305) 539-3324

EDWARD M. CRANE
R. RYAN STOLL
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
333 W. Wacker Dr.
Suite 2100
Chicago, IL 60606
(312) 407-0700

STEPHANIE G. KOLMAN
ADORNO & YOSS, P.A.
2525 Ponce de Leon Blvd.
Suite 400
Miami, FL 33134
(305) 858-5555

JOHN D. ALDOCK
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

V. ROBERT DENHAM, JR.
KATHLYNN L. BUTLER
SUMMER H. MARTIN
POWELL GOLDSTEIN LLP
One Atlantic Center
14th Floor
1201 W. Peachtree St., N.W.
Atlanta, GA 30309

Counsel for Petitioners

March 24, 2005